

**AS THE *ENTERPRISE WHEEL* TURNS:
NEW EVIDENCE ON THE FINALITY OF LABOR ARBITRATION AWARDS**

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Summary

Our study examines 281 federal court decisions from April 2001- May 2006 that ruled on challenges to labor arbitration awards. These award appeals are regulated by the Supreme Court's *Enterprise Wheel* decision. District courts confirmed 77.6% of challenged awards, an increase of about 7 percentage points compared to our earlier studies of litigated awards from 1960 - 2001. The result was very similar for appellate cases— a confirmation rate of 76.3%, and nearly the same gain in percentage points.

These results clearly suggest that the Supreme Court's rebuke of lower courts in *Eastern Associated Coal Corp.* (2000) and *Garvey* (2001) have changed how judges review arbitrator rulings. But this uniformly positive development masks observable differences in the federal circuits where these cases were decided.

- The Sixth Circuit routinely applies a four part essence test. This standard seems more intrusive than the simple essence test in *Enterprise Wheel*. The four part essence test has become so controversial among these judges that they decided *en banc* in May 2006 to reconsider its use. Our data shed important new light on this development: The four part essence test yields outcomes that are similar to other *Enterprise Wheel* tests, but it stimulates an excessive amount of federal lawsuits.

- On the opposite end of the award deference spectrum, courts in the Second Circuit enforce more than 90% of challenged awards. This trend is so clear that virtually no one there appeals a district court's enforcement ruling. Courts in the Seventh Circuit have a similar confirmation rate, arrived at by applying Rule 11 sanctions to award challenges that are judged to be meritless.

- Data show that judges in the Fifth Circuit are in an isolationist camp. At the district and appellate levels in this study, these courts confirmed awards in only 44.4% of the cases. This is similar to findings in our earlier studies. A correction is needed for the Fifth Circuit's long deviation from the deferential posture that the Supreme Court has commanded. These data might enable Fifth Circuit judges to see their problem and correct it by exercising more restraint.

- We found that 16 appellate decisions confirmed awards that were vacated by district courts, while 5 awards were vacated by appellate courts after these arbitrator rulings were confirmed by lower courts. This 3:1 ratio favoring award confirmation means that new precedents are reinforcing *Enterprise Wheel* messages of deference to district judges.

Overall, the empirical results are healthy indicators for the national policy that favors arbitration. The Supreme Court's on-going investment in promoting judicial deference to awards is paying dividends not only for the institution of labor arbitration, but by implication, for newer ADR applications in individual employment, commercial transactions, environmental disputes and others.

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I. INTRODUCTION

A. Context for This Empirical Research

Two parties in a long-term relationship become embroiled in a dispute. A third person is drawn into their private circle and unwittingly complicates the relationship. Before long, their escalating quarrel is taken before a judge for resolution. TV fans of *As The World Turns* are familiar with this triangular intrigue.

This summary also describes the subject of our empirical research in *As the Enterprise Wheel Turns*. Two parties in a long-term relationship— here, a union and employer— are entangled in a contract dispute. A third person, an arbitrator, enters into the controversy. Next, the arbitrator’s decision disturbs the underlying relationship. One of the parties cannot accept the ruling, and appeals to a federal judge.

The Supreme Court has indulgently regulated this triangular affair since its 1957 landmark decision in *Textile Workers Union v. Lincoln Mills*¹— about the time that the popular TV soap opera first aired.² *Lincoln Mills* authorized federal courts to fashion a common law for the enforcement of collective bargaining agreements (CBAs), including court petitions to confirm or vacate arbitrator awards that rule on grievances of alleged contract violations. In 1960, the Court set forth principles in three closely integrated decisions— now called the *Trilogy*³— to guide federal judges who are drawn into arbitration disputes.

¹ 353 U.S. 448 (1957). The Court ruled that federal jurisdiction to enforce collective bargaining agreements, including arbitration provisions, arises under Section 301 of the Labor-Management Relations Act of 1947, and not the Federal Arbitration Act. *Id.* at 450-51.

² See <http://www.cbs.com/daytime/atwt/about/showinfo/>. The show has run continuously since April 1956.

³ *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, *infra* note 4.

Trilogy standards for reviewing an arbitrator's award were set forth in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*⁴ Federal judges at that time understood the institutional history that led to the *Trilogy*. Unions were a force.⁵ Because grievance arbitration was agreed upon in most CBAs, Section 301 of the Labor-Management Relations Act (LMRA) provided a legal process to enforce this bargain.⁶ In a vital *quid pro quo*, unions promised not to strike if employers agreed to submit disputes to binding arbitration.⁷

But from the inception of the *Trilogy*, the judiciary's role has been questioned. Skeptics claim that judges intrude on this private process by usurping the role of the arbitrator and adjudicating grievances.⁸ We take these concerns seriously because of the

⁴ 363 U.S. 593 (1960).

⁵ THOMAS A. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 128 tbl.5-1 (1980) (showing that in 1956, 17,490,000 out of 52,408,000 employees, or 33.4%, were union members).

⁶ S. REP. NO. 80-105 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 421 (1959). *Also see* H.R. REP. NO. 80-245 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 337 (1959), explaining congressional intent for enacting Section 301:

When labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of proceedings involving violations of such contracts as those applicable to all other citizens. Labor organizations cannot justifiably ask to be treated as responsible contracting parties unless they are willing to assume the responsibilities of such contracts to the same extent as the other part must assume his.

Compare to AT&T, *infra* note 22, at 648, observing that the *Trilogy* "precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement."

⁷ *See* R.W. FLEMING, THE LABOR ARBITRATION PROCESS 31-32 (1965): "Indeed, it is apparent that the decisions of the Supreme Court which have so greatly enhanced labor arbitration . . . are in large part based on the theory that the arbitration clause is the *quid pro quo* for the no-strike clause." The use of labor arbitration grew from the 1940s to the 1950s, and has been a mainstay ever since. *Compare* a 1944 survey, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, ARBITRATION PROVISIONS IN UNION AGREEMENTS 2, 4 tbl. 1 col. 2 (73% of firms covered by a labor agreement had an arbitration provision in their contract) and a 1953 survey in BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR-MANAGEMENT CONTRACT PROVISIONS 10, 4 tbl. 1 col. 2 (89% of firms covered by a labor agreement had an arbitration provision in their contract).

⁸ A scholarly illustration appears in Thomas G.S. Christensen, *The Disguised Review of the Merits of Arbitration Awards*, 25 PROC. NAT'L ACAD. ARB. 99 (1973), criticizing Judge Paul Raymond Hays' view that "the arbitrator has the jurisdiction to be wrong . . . [t]he question is whether he has authority to decide issues contrary to the provisions of the contract." *Id.* at 104. Arbitrator Christensen believed that acceptance of Judge Hays' view "makes very real the warning of Enterprise that 'plenary review by a court

potential for court review to reduce arbitration to a pre-trial discovery proceeding—adding delay and cost to a process that is supposed to be quick and inexpensive.⁹

This background highlights the importance of our empirical research on federal court review of labor arbitration awards. Debate among judges, academics, and attorneys as to the proper level of judicial deference is driven by textual analysis of appellate decisions.¹⁰ We do not believe that lead cases are accurate gauges of court behavior. So, in two earlier studies, we collected and analyzed data contained in over 1,783 federal court rulings on labor arbitration awards that were rendered from June 1960 – March 2001.¹¹ In the present study, we add 281 new cases from federal court decisions that were

of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final.” *Id.* Similar concerns are raised in Michael H. Gottesman, *Enforceability of Awards: A Union Viewpoint*, 41 PROC. NAT'L ACAD. ARB. 88 (1989); William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464, 464 (1989) (observing that in the 30 years since the Trilogy, “the landscape of judicial review of labor arbitration is now more reminiscent of a thirty years' war than a substitute for strife once heralded”); Christopher T. Hexter, *Judicial Review of Labor Arbitration Awards: How the Public Policy Exception Cases Ignore the Public Policies Underlying Labor Arbitration*, 34 ST. LOUIS U.L.J. 77 (1989); Stephen R. Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over?*, 40 PROC. NAT'L ACAD. ARB. 25 (1988); and Jan Vetter, *Enforceability of Awards: Public Policy Post-Misco*, 41 PROC. NAT'L ACAD. ARB. 75 (1989).

⁹ Compare *Production and Maint. Employees' Local 504, Laborers' Intern. Union of North Am. v. Roadmaster Corp.*, 916 F.2d 1161, 1163 (7th Cir. 1990), stating that “arbitration clauses are agreements to move cases out of court, to simplify dispute resolution, making it quick and cheap. . . .”

¹⁰ We cite two especially significant critiques because their authors are widely respected. See David E. Feller, *End of the Trilogy: The Declining State of Labor Arbitration*, 48 ARB. J. 18 (Sept. 1993) for a pessimistic assessment by a leading labor law professor who played a personal role in the original Trilogy litigation. Also consider the very negative assessment of fellow jurists by a D.C. Circuit Court of Appeals judge, in Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT LAW REVIEW 3, 4 (1988): “In recent years, this long-standing policy of judicial deference has been significantly undercut by a series of lower court decisions that vacate arbitration awards on the ground that they conflict with public policy. In my view, these courts have engaged in unprincipled and unwarranted judicial activism. . . . Under the guise of public policy, therefore, these courts have substituted their own views of industrial justice for the views of the arbitrator.”

¹¹ Michael H. LeRoy & Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 INDUS. REL. L.J. 78, 98 (1992). This research analyzed 1,148 federal district court decisions and 480 federal circuit court decisions that resulted in a court order which compelled or denied arbitration or which enforced or vacated an arbitrator's award in whole or in part. These decisions were published after June 23, 1960 and before July 1, 1991. A follow-up study, Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. DISP. RESOL. 19, 50 tbl.1 (2001), reported data for court review of awards from 1991-2001.

issued between April 1, 2001 and May 31, 2006. Our extensive database puts us in a unique position to evaluate critical claims that arise in this on-going debate.

But why does this matter? Our research is relevant to the Supreme Court's continuing stewardship of this vital process. As we explain in more detail later, the *Trilogy* was sufficiently comprehensive to be the final word on this subject. But the Court has repeatedly felt obliged to warn lower courts from interfering with an arbitrator's award. This litany suggests that Justices believe that too many federal courts fail to heed its strong message of deference—in effect, endorsing the recent view of critics¹² that too many judges re-arbitrate contract disputes that were meant to be resolved by a final and binding award. Adding cogency to our empirical research, the Court issued two recent opinions that admonished federal judges.¹³

As the *Enterprise Wheel* nears its 50th anniversary, more is at stake than the institution of labor arbitration. Private sector unions are waning.¹⁴ Strikes—the ultimate concern of Congress when it passed the law that led to *Enterprise Wheel*—are almost non-existent.¹⁵ But the Supreme Court's docket shows that arbitration is expanding to lending,¹⁶ individual employment,¹⁷ commercial,¹⁸ international,¹⁹ and technology

¹² *Infra* notes 122-123.

¹³ See Eastern, *infra* note 76, and Garvey, *infra* note 85.

¹⁴ Bureau of Nat'l Affairs, *Unions: BLS Reports Percentage of Workers In Unions Still 12.5 Percent, But Overall Numbers Up*, DAILY LAB. REP'T (BNA No. 14), Jan. 23, 2006, at AA-1 (only 7.8% of U.S. workers in the private sector belong to a union, according to the most recent measurement).

¹⁵ Strike activity remained very low, with only 22 major work stoppages in 2005, up from 17 in 2004. See Bureau of Nat'l Affairs, *Work Stoppages: Major Strikes, Lockouts Rose in 2005 But Lost Work Time Down By Half From '04*, DAILY LAB. REP'T (BNA No. 42), March 3, 2006, at D-1.

¹⁶ *Buckeye Check Cashing, Inc. v. Cardegna*, 126 U.S. 1204 (2006).

¹⁷ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

¹⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

¹⁹ *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

disputes.²⁰ Even in water-use lawsuits between states, one can see the labor arbitration model as an ADR paradigm.²¹ While regulating these newer dispute resolution applications, the Supreme Court has relied on *Trilogy* lessons,²² and therefore has a large investment in the independent functioning of labor arbitration.

B. Organization of This Article

Our quantitative findings cannot be understood without some background. In Part II, we examine the standards of judicial review in *Enterprise Wheel* and related *Trilogy* cases.²³ Part II.A demonstrates that *Enterprise Wheel* instructed judges in a patient, instructional voice.²⁴ Part II.B shows that as the employment relationship was more regulated, tensions arose between the requirements of a CBA and new laws.²⁵ This prompted employers to challenge arbitration awards on public policy grounds. In *Misco*, the Supreme Court deterred courts from overturning awards that are inconsistent with public policies.²⁶ More recently, in *Eastern*²⁷ and *Garvey*,²⁸ the Court has abandoned its collegial tone as Justices have grown weary of repeating the same award-deference message to federal judges.

²⁰ AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999).

²¹ Consider *Kansas v. Colorado*, 543 U.S. 86 (2004), where two states disputed water rights to the Arkansas River. The Court said that “the need for a River Master is diminished by the fact that the parties may find it possible to resolve future technical disputes through arbitration.” *Id.* at 93. It continued by describing a tri-partite arbitration model that is familiar to railroads and airlines under the Railway Labor Act: “In case of an equally divided vote, the Administration (with the consent of both States) may refer a matter for resolution to the Representative of the United States or other arbitrator or arbitrators. The arbitrator’s determinations are binding.” *Id.*

²² *E.g.*, *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (“The first principle gleaned from the Trilogy is that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”).

²³ *Infra* notes 47 - 98.

²⁴ *Infra* notes 48 - 68.

²⁵ *Infra* notes 69 - 98.

²⁶ *Infra* notes 69 - 71.

²⁷ *Infra* notes 72 - 74.

²⁸ *Infra* notes 76 - 84.

Part III.A explains our research methodology,²⁹ and Part III.B reports our statistical findings.³⁰ Finding No. 1 shows that courts now enforce awards in about 76% of their decisions, a marked increase from past years.³¹ Finding No. 2 reports that more appellate decisions reverse a lower court's non-enforcement order, compared to appellate decisions that vacate an award which a lower court has enforced.³²

Courts enforce between 70% - 80% of challenged awards, regardless of the legal argument, in Finding No. 3A.³³ The four part essence test is examined in Finding No. 3B.³⁴ This test yields the same enforcement rate as other legal arguments that challenge awards. Unfortunately, it also stimulates excessive award lawsuits. Two court opinions provide context for these statistics. One demonstrates that the test can be applied with deference,³⁵ and the other illustrates intrusive court review.³⁶ Finding No. 3C shows that the public policy test does not diminish court enforcement of arbitrator rulings— an important change from our last study.³⁷ Three cases explain this outcome. One is an example of an employer who dropped its public policy challenge after the Supreme Court strongly discouraged these lawsuits in *Eastern*.³⁸ The second case shows that other employers blend a public policy argument with the idea that an unlawful award cannot draw its essence from the contract.³⁹ So far, this approach has not persuaded judges.

Finally, there is the case of a nurse who was reinstated after violating a drug-dispensing

²⁹ *Infra* notes 85 - 98.

³⁰ *Infra* notes 99 - 106.

³¹ *Infra* notes 107 - 224.

³² *Infra* notes 109 - 110.

³³ *Infra* notes 111 - 113.

³⁴ *Infra* notes 114 - 144.

³⁵ *Infra* notes 127 - 133.

³⁶ *Infra* notes 134 - 144.

³⁷ *Infra* notes 145 - 193.

³⁸ *Infra* notes 150 - 167.

³⁹ *Infra* notes 168 - 176.

policy.⁴⁰ It shows the great deference that courts now pay to awards in the face of continuing public policy challenges.

Finding No. 4 shows that the Second and Seventh Circuits are significantly more deferential to arbitration, and the Fifth Circuit is significantly less deferential, compared to other courts.⁴¹ A case on Rule 11 sanctions demonstrates why courts in the Seventh Circuit are so deferential.⁴² A second case cleverly communicated this court's policy on great deference.⁴³ In contrast, a Fifth Circuit case shows that judges re-arbitrated a grievance while vacating an award.⁴⁴ It contradicts the deference precepts in *Eastern* and *Garvey*. Finding No. 5 puts our present findings in a historical light by showing that award enforcement is now at its peak in our 46 year database of cases.⁴⁵

Part IV reports the general conclusions and implications from these findings.⁴⁶

II. THE SUPREME COURT'S MANAGEMENT OF FEDERAL COURTS: FROM PATIENT GUIDANCE TO REPROACHFUL REMINDERS

In our earlier studies, we explained the reviewing standards in *Enterprise Wheel* and related *Trilogy* decisions.⁴⁷ Repeating this entire background is unnecessary, but omitting this context is also unwise. In developing this part of our Article, we have two aims. The Supreme Court's award reviewing principles are related to the research variables and results that appear later in the Article. Second, we focus on the Supreme Court's tone in talking to other federal courts since 1960. Its collegiality has worn thin,

⁴⁰ *Infra* notes 177 - 193.

⁴¹ *Infra* notes 194 - 220.

⁴² *Infra* notes 196 - 205.

⁴³ *Infra* notes 206 - 207.

⁴⁴ *Infra* notes 208 - 220.

⁴⁵ *Infra* notes 221 - 224.

⁴⁶ *Infra* notes 225 - 234.

⁴⁷ The most complete history appears in LeRoy & Feuille, *Private Justice in the Shadow of Public Courts*, *supra* note 11, at 29-40.

descending from patient guidance in the *Trilogy* to verbal jabs. This subtlety is easy to overlook because Supreme Court rulings provide more substantive information. But, while recently overseeing judicial review of labor arbitration awards, the Court has made no new ruling. Instead, its opinions have served as public notices to judges and attorneys to treat awards as final resolutions to grievances.

A. *Enterprise Wheel's Patient Guidance for Judges Who Review Awards*

In *Enterprise Wheel*, an arbitrator's award reduced the termination of several employees to ten day suspensions.⁴⁸ After the employer refused to comply with the ruling,⁴⁹ the matter was taken up by the federal courts. The Fourth Circuit denied enforcement to the award,⁵⁰ but the Supreme Court reversed this ruling.⁵¹ In a short opinion, the *Enterprise Wheel* Court said much. Setting a tone for great deference, the majority said that the "[r]efusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."⁵² This is because the "federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."⁵³

Adding substance to this respectful approach, *Enterprise Wheel* said that an arbitrator is "to bring his *informed judgment* to bear in order to reach a *fair solution of a problem* (our emphasis)."⁵⁴ We emphasize *informed judgment* because these two words say something about the Court's understanding of labor arbitration. Arbitrators are selected by the parties because they are familiar with the peculiarities of unionized work

⁴⁸ *Enterprise Wheel*, *supra* note 4, at 595.

⁴⁹ *Id.*

⁵⁰ *Id.* at 595-96.

⁵¹ *Id.* at 599.

⁵² *Id.* at 596.

⁵³ *Id.*

⁵⁴ *Id.* at 597.

in an industrial setting.⁵⁵ While collective bargaining agreements are contracts, they are not bargained and administered like commercial transactions.⁵⁶

Enterprise Wheel also mentioned *fair solution of a problem* (our emphasis). In using this expression the Court said that an arbitrator plays a more complex role than a judge in contract litigation. When arbitrators reach a fair solution to a problem, courts must understand “the need . . . for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.”⁵⁷

But *Enterprise Wheel* provided judges grounds to deny enforcement to an award: “Nevertheless, an arbitrator is *confined to interpretation and application* of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice (our emphasis).”⁵⁸ We highlight *confined to interpretation and application* because this passage is in tension with *Enterprise Wheel*’s idea that an arbitrator serves as a problem solver. Confining an arbitrator to interpreting and applying contract terms creates a judicial check on arbitrator awards.

An arbitrator “may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its *essence* from the collective bargaining agreement (our emphasis).”⁵⁹ Our research shows this is the most common argument in post-award

⁵⁵ *Id.* at 596, n.2.

⁵⁶ *Id.* at 599, explaining that the agreement by unions and employers to submit contract disputes to labor arbitrators is founded in their confidence in this neutral’s abilities. More evidence of this distinction appears in *Warrior & Gulf*, *supra* note 3, at 578 (“In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife.”).

⁵⁷ *Id.* at 597.

⁵⁸ *Id.*

⁵⁹ *Id.*

litigation.⁶⁰ *Essence* is emphasized to demonstrate the abstruse quality of this test.

Enterprise Wheel also stated that a “mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award.”⁶¹ An award should not be disturbed unless the arbitrator “has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration.”⁶² A court should not vacate an award merely because it disagrees with the arbitrator’s construction of the agreement.

Enterprise Wheel patiently guided federal judges. The Court’s voice was instructional when it said that “the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator’s construction which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.”⁶³

Other *Trilogy* decisions added to *Enterprise Wheel*’s body of law for reviewing awards. *American Manufacturing* noted that the “function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator,” because it is “the arbitrator’s judgment . . . that was bargained for.”⁶⁴ *Warrior & Gulf* noted that the arbitrator “is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept He is rather part of a

⁶⁰ See Table 1, showing that award challenges relied on the essence argument more often (139 times in a sample of 201 awards) than any other.

⁶¹ *Enterprise Wheel*, *supra* note 4, at 567-68.

⁶² *Id.* at 567.

⁶³ *Id.*

⁶⁴ *American Mfg.*, *supra* note 3, at 595.

system of self-government created by and confined to the parties.”⁶⁵ In this vein, “[t]he labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.”⁶⁶ The decision also said that arbitrators have special competence to resolve workplace disputes: “The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.”⁶⁷ *Warrior & Gulf* created a paradox for judges by allowing an arbitrator to consider matters not contained in a contract.⁶⁸

B. Sterner Messages for Judges Who Review Awards

As government regulation of the employment relationship grew by the 1980s, laws impinged on working conditions that were otherwise governed by a CBA. To illustrate, new regulations authorized employers to implement drug testing.⁶⁹ Controversies arose when arbitrators reinstated employees who were discharged without just cause for drug violations.⁷⁰ Some employers challenged these awards on grounds that reinstatement undermined criminal laws and workplace regulations.⁷¹

⁶⁵ *Warrior & Gulf*, *supra* note 3, at 578.

⁶⁶ *Id.* at 582.

⁶⁷ *Id.* at 581.

⁶⁸ *Id.* at 581, noting: “The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.”

⁶⁹ Congress passed the Drug-Free Workplace Act in 1988, which authorized federal contractors to implement drug-abuse prevention and penalty programs for offenders. 41 U.S.C. app. § 702(a) (1994). This paved the way for the Omnibus Transportation Employee Testing Act of 1991, 41 U.S.C. app. § 2717 (1994). This law directed the U.S. Department of Transportation to establish mandatory substance-abuse prevention requirements for 8.1 million workers in safety sensitive jobs.

⁷⁰ *E.g.*, *Florida Power Corp. v. IBEW Local 433*, 847 F.2d 680 (11th Cir. 1988).

⁷¹ See district court rulings that vacated awards on public policy grounds in *Iowa Electric Light & Power Co. v. Int’l B’hd of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987), and *Delta Air Lines v. Airline*

In *United Paperworkers Int’l Union v. Misco*,⁷² the Supreme Court discouraged federal courts from upsetting awards that contradict the spirit but not the substance of a public policy. In a notable refinement of *Trilogy* principles, *Misco* warned lower courts from interfering with “improvident, even silly factfinding.”⁷³ The Court reminded judges: “This is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts.”⁷⁴

But some judges continued to meddle in these public policy cases,⁷⁵ prompting the Supreme Court in 2000 to restate its ground rules for reviewing these awards in *Eastern Associated Coal Corp. v. United Mine Workers District 17*.⁷⁶ A coal company fired an employee on two different occasions after concluding that he used marijuana while driving heavy machinery on a public highway.⁷⁷ Separate arbitration awards reinstated him with conditions after finding that just cause was lacking.⁷⁸ The company refused to comply with the second award, contending that it violated a U.S. Department of Transportation rule stating that “the greatest efforts must be expended to eliminate the . . . use of illegal drugs . . . by those individuals . . . are involved in . . . the operation of

Pilots Ass’n, 686 F.Supp. 1573 (N.D. Ga. 1987).

⁷² 484 U.S. 29 (1987). An arbitrator reinstated a paper mill worker who was fired after he was arrested in the company parking lot on a drug charge. Lower courts vacated the award—and thus, the Company did not reinstate the grievant—because they believed that it would violate a public policy against operating dangerous machinery by drug-users. *Id.* at 35. *Misco* reversed these rulings, holding that awards may be set aside only if they “would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to laws and legal precedents and not from general considerations of supposed public interests.” *Id.* at 43.

⁷³ *Id.* at 39.

⁷⁴ *Id.*

⁷⁵ *E.g.*, *Delta Air Lines v. Airline Pilots Association*, 861 F.2d 665 (11th Cir. 1988); *Newsday, Inc. v. Long Island Typographical Union*, No. 915, 915 F.2d 840 (2d Cir. 1990); and *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244 (5th Cir. 1993).

⁷⁶ 531 U.S. 57 (2000).

⁷⁷ *Id.* at 60.

⁷⁸ *Id.* at 60–61.

. . . trucks.”⁷⁹ Rejecting the employer’s argument, the Supreme Court noted that DOT rules also favor rehabilitation of drug users, and do not preclude reinstatement of offenders to driving positions.⁸⁰

Eastern reminded judges to review awards with great deference. Its stern tone in addressing federal judges is highlighted:

- “[B]oth employer and union have granted to the arbitrator the authority to interpret the meaning of their contract’s language, including such words as just cause.”⁸¹

- “They have bargained for the arbitrator’s construction of their agreement. And courts will set aside the arbitrator’s interpretation of what their agreement means *only in rare instances* (emphasis added).”⁸²

- “[A]s long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, *the fact that a court is convinced he committed serious error does not suffice to overturn his decision* (emphasis added).” cause.⁸³

- “[T]he *proper judicial approach* to a labor arbitration award is to refuse to review the merits.”⁸⁴

These reminders to judges should have sufficed. Apparently, though, the Supreme Court believed it needed to reinforce its award deference policy. So, one year later, in *Major League Baseball Players Ass’n v. Garvey*,⁸⁵ the Court used a particularly egregious example of judicial interference in arbitration to speak again to judges. An

⁷⁹ *Id.* at 63.

⁸⁰ *Id.* at 64.

⁸¹ *Id.* at 61.

⁸² *Id.* at 62.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ 532 U.S. 504 (2001).

arbitrator denied a grievance from a star baseball player who alleged that team owners conspired to limit his contract offers.⁸⁶ A federal district court denied Steve Garvey's appeal to vacate the award.⁸⁷ But the Ninth Circuit reversed and remanded with instructions to vacate the award.⁸⁸ The district court ordered a remand to the arbitrator without vacating the award, causing Garvey to appeal again.⁸⁹ This time, the appeals court reversed the district court, and directed that it remand the case to the arbitration panel with instructions to enter an award for Garvey in the amount he claimed.⁹⁰ By this order, the Ninth Circuit re-arbitrated the grievance.

In acerbic language, the Supreme Court held up the Ninth Circuit's review of the arbitrator's award as an example to avoid. At the heart of this arbitration, the parties disputed the credibility of a 1996 letter written, by a baseball team owner, which supported Garvey's collusion theory. The arbitrator did not find the letter credible, prompting the Ninth Circuit to conclude that this fact-finding was "inexplicable" and "border[ed] on the irrational."⁹¹

The Supreme Court castigated the Ninth Circuit for insincerely reciting *Trilogy* principles. And the Court embarrassed the Ninth Circuit by calling its behavior "nothing short of baffling."⁹² *Garvey* emphasized that "established law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision."⁹³ Making no effort to

⁸⁶ *Id.* at 506.

⁸⁷ *Id.* at 507.

⁸⁸ *Id.* at 508.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 510.

⁹³ *Id.* at 511.

veil its blame, *Garvey* charged that the “Court of Appeals usurped the arbitrator’s role by resolving the dispute and barring further proceedings, a result at odds with this governing law.”⁹⁴ The Court added: “The arbitrator’s analysis may have been unpersuasive to the Court of Appeals, but his decision hardly qualifies as serious error, let alone irrational or inexplicable error. And, as we have said, any such error would not justify the actions taken by the court.”⁹⁵ *Garvey* sent a clear, reinforcing message to the federal judiciary: Do not overturn “the arbitrator’s decision because it disagree[s] with the arbitrator’s factual findings, particularly those with respect to credibility.”⁹⁶ And do not resolve the merits of the parties’ dispute.⁹⁷ Instead, if a court cannot enforce an award, it must remand the matter “for further arbitration proceedings.”⁹⁸

III. EMPIRICAL RESEARCH METHODS AND FINDINGS

A. Research Methods

We used research methods from our earlier empirical studies.⁹⁹ The sample was derived from Westlaw’s internet service. Using an appropriate federal law database (FLB-ALL), we employed keywords such as “TRILOGY” or “WARRIOR & GULF” or “ENTERPRISE WHEEL” or “AMERICAN MANUFACTURING,” or “MISCO,” or “EASTERN ASSOCIATED COAL,” or “GARVEY.” In order to be included, a case involved a post-award dispute between a union and employer in which the arbitrator’s ruling was challenged.

⁹⁴ *Id.*

⁹⁵ *Id.* at 511, n.2.

⁹⁶ *Id.* at 510.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ For elaboration see LeRoy & Feuille, *Private Justice* in *supra* note 11, at 46-48.

The sample was limited to decisions from April 1, 2001 to May 31, 2006.¹⁰⁰

When a potential case was identified, we read it to see if it met our criteria. A case was added when it (1) was made either by a federal district or circuit court pursuant to some form of federal jurisdiction, (2) involved award confirmation or vacatur, and (3) had an employer and union as parties. A decision was not included if it failed to meet any criterion.

For clarity, we describe related cases that were excluded: (1) an award that was ruled on by a state court,¹⁰¹ or administrative agency,¹⁰² (2) an action to compel arbitration,¹⁰³ (3) a labor arbitration award that was challenged by an individual employee, rather than a party to the underlying labor agreement,¹⁰⁴ or (4) an arbitration award resulting from an individual employment agreement.¹⁰⁵

Once a case met the criteria, it was checked against a roster of previously read and coded cases to avoid duplication. In its final form, this roster appears in the Appendix. Next, data were extracted from each case for the following variables: (1) federal circuit in which court was located, (2) year of district decision, (3) year of circuit court decision, (4) type of issue that was ruled on by the arbitrator, (5) party who prevailed in the arbitration award, (6) party who challenged the award, (7) legal arguments made by party

¹⁰⁰ We started the current database at the point where our 1991-2001 ended.

¹⁰¹ *Dayton v. AFSCME, Ohio Council 8*, 2005 WL 3240794 (Ohio App. 2 Dist. 2005). These cases were excluded to focus on federal court behavior.

¹⁰² *U.S. Dep't of Homeland Sec. & Am. Fed. of Gov't Employees, Local 2805*, 2005 WL 1902554 (F.L.R.A. 2005). Because these cases were adjudicated by administrative law judges, rather than Article III federal judges, they were excluded.

¹⁰³ *R.J. Corman Derailment Serv., L.L.C. v. Int'l Union of Operating Engineers, Local No. 150*, 422 F.3d 522 (7th Cir. 2005). These actions occurred before an award was rendered.

¹⁰⁴ *Smith v. Lyondell Citgo Refining*, 2005 WL 2875306 (S.D. Tex. 2005). These cases alleged that a union failed to represent an employee properly or fairly, and are fundamentally different from our cases.

¹⁰⁵ *Lee v. McDonald Securities, Inc.*, 2004 WL 2535277 (N.D. Ill. 2004). These cases are typically in non-union settings, and often involve a mandatory arbitration agreement— quite different from the negotiated arbitration clauses that are in our cases.

who challenged the award,¹⁰⁶ (8) party who won at the district court level, (9) district court ruling on motion to confirm or vacate an award, (10) party who won at the circuit court level, and (11) circuit court ruling on motion to confirm or vacate an award.

B. Research Findings

We found 201 labor arbitration awards that were appealed to a federal district court and ruled upon by a judge. In 80 cases, a party appealed the district court order to a federal circuit court, and received a second decision. In 45.9% of the awards, arbitrators decided a termination issue. They ruled on lesser forms of discipline in another 4.6% of cases. The next most common issues were work jurisdiction-subcontracting (18.6%), and work conditions (9.8%). Court rulings were unevenly distributed by federal circuit. More than half of the cases were from the Sixth (26.4%), Eighth (13.4%), and Third Circuits (11.4%).¹⁰⁷ In the next cluster were the Fifth (9.0%), Seventh (8.5%), Second (7.5%), Ninth (7.5%), and First Circuits (7.0%). Few cases occurred in the Fourth (3.5%), Eleventh (2.5%), D.C. (2.5%), and Tenth Circuits (1.0%). In reporting the following findings, we also examine textual details of selected cases. This explains developments that are not obvious in the data.

• Finding No. 1: Federal Courts Enforce More Than 76% of Challenged Awards.

Table 1 shows that district court judges confirmed 156 out of 201 awards, yielding an enforcement rate of 77.6%.¹⁰⁸ Appellate courts enforced 61 of the 80 contested awards, for a 76.3% confirmation rate.

¹⁰⁶ We coded each type of argument individually because many award challenges rely on more than one legal theory.

¹⁰⁷ These three circuits accounted for 51.2% of our national sample.

¹⁰⁸ The terms enforce and enforcement are interchangeable with confirm and confirmation.

Table 1 Labor Arbitration Awards Reviewed By Federal Courts Using <i>Trilogy</i> and FAA Standards April 1, 2001 – May 31, 2006 (N = 201 Awards)				
Appealed Awards	District Court Rulings		Appeals Court Rulings	
<i>Basis For Challenge of Award</i>				
<i>Trilogy</i> (Authority)	96/125	76.8%	36/51	70.6%
<i>Trilogy</i> (Essence)	106/139	76.3%	43/60	70.5%
<i>Trilogy</i> (Four-Part Essence)	24/32	75.0%	8/10	80.0%
<i>Trilogy</i> (Fact Finding)	17/23	73.9%	7/9	77.8%
<i>Trilogy</i> (Public Policy)	34/42	81.0%	18/22	81.8%
<i>Trilogy</i> (Brand of Justice)	17/24	70.8%	4/9	44/4%
FAA (Evident Partiality)	5/5	100.0%	1/1	100.0%
FAA (Misconduct)	4/4	100.0%	2/2	100.0%
FAA (Exceeds Power)	14/15	93.3%	4/4	100.0%
FAA (Manifest Disregard)	4/7	57.1%	3/4	75.0%
Miscellaneous— Incomplete Award	13/17	76.5%	3/3	100.0%
Miscellaneous— Punitive Award	2/2	100.0%	0	
Miscellaneous— Fraudulent Award	4/4	100.0%	4/4	100.0%

• Finding No. 2: Appellate Courts Confirmed Awards That District Courts Vacated Three Times More Often Than Appellate Courts Vacated Awards That District Courts Confirmed.

Sixteen appellate decisions confirmed awards that were vacated by district courts,¹⁰⁹ while five awards were vacated by appellate courts after these arbitrator rulings

¹⁰⁹ See Airline Professional Assoc. of Int'l Brotherhood of Teamsters, Local Union No. 1224 v. ABX Air, Inc., 274 F.3d 1023 (6th Cir. 2001); Boston Medical Center v. Service Employees Int'l Union No. 285 F.3d 16 (1st Cir. 2001); Brotherhood of Maintenance of Way Employees v. Soo Line Railroad Co., 266 F.3d 907 (8th Cir. 2001); Brotherhood of Maintenance of Way Employees v. Terminal Railroad Ass'n of St. Louis, 307 F.3d 737 (8th Cir. 2002); Butler Mfg. Co. v. United Steelworkers of America, Local 2629, 336 F.3d 629 (7th Cir. 2003); City Market, Inc. v. Local No. 7, United Food & Comm. Workers Int'l Union, 116 Fed. Appx. 960 (10th Cir. 2004); Eisenmann Corp. v. Sheet Metal Workers Int'l Ass'n Local No. 24, 323 F.3d 375 (6th Cir. 2003); Finley Lines Joint Protection Bd. Unit 200 v. Norfolk Southern Railway Co., 312 F.3d 943 (8th Cir. 2002); Huber, Hunt & Nichols v. United Ass'n of Journeymen & Apprentices of Plumbing and Pipefitters, 282 F.3d 746 (9th Cir. 2002); Int'l Union of Operating Engineers, Local 139 v. J.H. Findorff, Inc., 393 F.3d 742 (7th Cir. 2004); Keebler Co. v. Truck Drivers, Local 170, 247 F.3d 8 (1st

were confirmed by lower courts.¹¹⁰

• Finding No. 3(A): The Frequency of Court Confirmation of Awards Did Not Significantly Vary by the Type of Legal Argument.

Table 1 shows the frequency of *Trilogy*, Federal Arbitration Act (FAA),¹¹¹ and miscellaneous arguments that lawyers used to challenge awards. There was no statistically significant relationship between a legal argument and court rulings. Whatever the argument, courts enforced between 70% - 80% of arbitrator rulings.

There were two exceptions, but they were not statistically significant. When a party contended that an award violated the FAA's manifest disregard of the law standard,¹¹² district courts enforced only 57.1% of these awards. However, this was observed in only 3 out of 7 cases. Similar results occurred at the circuit court level, when a party contended under *Enterprise Wheel* that an arbitrator applied his own brand of

Cir. 2001); *Mercy Hospital, Inc. v. Massachusetts Nurses Ass'n*, 429 F.3d 338 (1st Cir. 2005); *Teamsters Local No. 5 v. Formosa Plastics, Corp.*, 363 F.3d 368 (5th Cir. 2004); *Teamsters Local No. 58 v. BOC Gases*, 249 F.3d 1089 (9th Cir. 2001); *United Paperworkers Int'l Union, Local 1737 v. Inland Paperboard & Packaging, Inc.*, 25 Fed. Appx. 316 (6th Cir. 2001); and *Weber Aircraft Inc. v. Gen. Warehousemen & Helpers Union, Local 767*, 253 F.3d 821 (5th Cir. 2001).

¹¹⁰ See *Alken-Ziegler, Inc. v. UAW Local Union 985*, 134 Fed. Appx. 866 (6th Cir. 2005); *Anheuser-Busch, Inc. v. Local Union No. 744, Int'l Brotherhood of Teamsters*, 280 F.3d 1133 (7th Cir. 2002); *Citgo Asphalt Refining Co. v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union, Local No. 2-991*, 385 F.3d 809 (3d Cir. 2004); *Continental Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 391 F.3d 613 (5th Cir. 2004); and *Pennsylvania Power Co. v. Local Union No. 272, IBEW*, 276 F.3d 174 (3d Cir. 2001). For insight on a new Justice's deferential view of arbitration, see Judge Alito's dissenting opinion—expressing a view that supported the union's position in this litigation. *Id.* at 182, stating that: the arbitrator's decision drew its essence from and was based on a construction of the anti-discrimination section. That the arbitrator probably misconstrued that provision is beside the point. The parties bargained for the arbitrator's construction of the agreement, and that is what they got. By intervening to rescue the Pennsylvania Power Company from one of the consequences of its bargain, the majority has exceeded the proper scope of our court's authority.

¹¹¹ Labor arbitration awards are occasionally reviewed under the Federal Arbitration Act, 9 U.S.C. § 10 (1994). The law authorizes courts to vacate an award where (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption by the arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

¹¹² E.g., *Electrolux Home Products v. UAW*, 416 F.3d 848 (8th Cir. 2005).

industrial justice.¹¹³ In 5 out of 9 cases (55.6%) courts refused to enforce an award.

• Finding No. 3(B): The Four Part Essence Test Makes No Significant Difference in Court Enforcement of Arbitrator Rulings.

The results in Table 2 are especially noteworthy in light of a current controversy in the Sixth Circuit. For the past 20 years, this court has fashioned its own version of *Enterprise Wheel*'s essence test. In a lead case, *Cement Divs., National Gypsum Co. v. United Steelworkers, Local 135*,¹¹⁴ the Sixth Circuit said that an award fails to draw its essence from a collective bargaining agreement if any of the following is true: (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement.¹¹⁵ By requiring a labor arbitration award to jump through four hoops for enforcement, this standard does not look like the picture of judicial deference that *Enterprise Wheel* painted.

The test has generated controversy by appearing to contradict the same circuit's pronouncement that appeals of arbitration awards are judged by "one of the narrowest standards of judicial review in all of American jurisprudence."¹¹⁶ In 2006, this tension came to a head. Judge Sutton, in *Michigan Family Resources, Inc. v. Service Employees Int'l Union Local 517M*,¹¹⁷ wrote a lengthy opinion to support his view that the four part essence test "made it easier to vacate an arbitration award on the merits than the Supreme

¹¹³ *E.g., Sterling Fluid Systems (USA), Inc. v. Chauffeurs, Teamsters & Helpers, Local Union No. 7*, 2005 WL 1653434 (6th Cir. 2005).

¹¹⁴ 793 F.2d 759 (6th Cir. 1986).

¹¹⁵ *Id.* at 766.

¹¹⁶ *Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 514-15 (6th Cir. 1999).

¹¹⁷ 438 F.3d 653, 658 (6th Cir. 2006) (Judge Sutton, concurring).

Court meant it to be.”¹¹⁸ Voicing unusual concern that “[r]epeated incantations of our test seem to have led us to vacate a surprising number of arbitration awards,”¹¹⁹ he conducted his own empirical research of Sixth Circuit rulings from 1986 through 2006 and found that “we have vacated 29% (10 out of 34) of labor-arbitration awards that we have reviewed on merits-based grounds.”¹²⁰ Judge Sutton asked: “Who among the practicing bar would not appeal an award that has a one-in-four chance of winning?”¹²¹

This was not the first criticism of the four part essence test. An especially critical scholar remarked that this court’s “variant of the essence construct sweeps away all pretense of judicial deference to the contract interpretation and application decisions of the arbitrator.”¹²² Another expert concluded that “the Sixth Circuit serves as an example of the circuits’ attempted end run around the Supreme Court’s rulings.”¹²³

Our findings speak in two important ways to this controversy. On one hand, they refute Judge Sutton’s concern by showing that when a court invokes this standard, the award enforcement rate does not drop from the high national norms in this study.¹²⁴ In other words, a party who challenges an award on this basis is no more likely to succeed than by using any other legal argument.

But we find statistical support for Judge Sutton’s concern that the four part

¹¹⁸ *Id.* at 658.

¹¹⁹ *Id.* at 662.

¹²⁰ *Id.*

¹²¹ *Id.* The judge also found that among unpublished opinions, the Sixth Circuit vacated 25% of those awards (19 out of 75) on similar grounds. *Id.*

¹²² Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 821 (2000).

¹²³ David E. Feller, *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 BERKELEY J. EMP. & LAB. L. 292, 303 (1998).

¹²⁴ Courts still enforce awards to an overwhelming extent. District courts confirmed 24 out of 32 awards (75.0%), while 8 out of 10 appeals courts confirmed awards that were challenged under the four part essence test.

essence test invites too many award challenges.¹²⁵ More than one-fourth of our national sample (26.4%) originated in the Sixth Circuit. Strengthening our inference, the Third Circuit also uses the four part essence test.¹²⁶ Although it covers a small territory, this circuit ranked third in the percentage of cases that appear in our sample (11.4%).

We briefly turn our attention from data to qualitative analysis. *Bixby Medical Center, Inc. v. Michigan Nurses Ass’n*,¹²⁷ illustrates a Sixth Circuit court’s deferential use of the four part essence test. The employer changed health insurance coverage for its workers by increasing deductibles and co-payments.¹²⁸ The hospital contended that the CBA did not require it to maintain a consistent level of health benefits.¹²⁹ Ruling for the union, an arbitrator ordered the hospital to cease making unilateral benefit changes.¹³⁰

The hospital attempted to vacate the award before a district court but lost its challenge. The Sixth Circuit focused on contract language that gave the employer the right to select or change insurance carriers, but this right was conditioned on providing

¹²⁵ *Id.* The judge also found that among unpublished opinions, the Sixth Circuit vacated 25% of those awards (19 out of 75) on similar grounds. *Id.*

¹²⁶ See *Citgo Asphalt Refining Co. v. Paper, Allied-Indus., Chemical and Energy Workers Intern. Union Local No. 2-991*, 385 F.3d 809, 817 (3d Cir. 2004). The decision is explained in some detail because it demonstrates that this circuit invites a disproportionate amount of award challenges. The employer unilaterally implemented a zero-tolerance substance abuse policy at all of its facilities, citing the hazardous nature of its refining and manufacturing processes. *Id.* at 811-12. The arbitrator issued a mixed award. He found no contract violation in the company’s unilateral adoption and implementation of this substance abuse policy. *Id.* at 814. He also found that the mandatory, random testing procedure was both proper and reasonable. *Id.* However, he sustained the local’s challenge to the zero tolerance policy, believing that it was unreasonable not to provide erring employees a second chance. *Id.* at 814-15. He fortified his thinking by stating that this “is especially so where the DOT regulations permit second chance or rehabilitation opportunities. I therefore find that the Policy should be modified in that regard.” *Id.* at 814. The Third Circuit reversed the district court order that enforced the award, using the fourth element in the essence test: “However, an arbitrator’s opinion and award based on ‘general considerations of fairness and equity,’ as opposed to the exact terms of the CBA, fails to derive its essence from the CBA.” *Id.* at 817. The court noted that the agreement said that “the arbitrator shall not substitute his judgment for that of the Company in the absence of a clear abuse of discretion.” *Id.* at 813 (although “the award here comported with the arbitrator’s view of fairness . . . [it] did not draw its essence from the CBA.”).

¹²⁷ 142 Fed. Appx. 843 (6th Cir. 2005).

¹²⁸ *Id.* at 844.

¹²⁹ *Id.*

¹³⁰ *Id.*

the same benefits.¹³¹ The court found that the arbitrator construed the CBA in light of these two sections, and concluded that she provided “a fair construction of the parties’ agreement.”¹³² The court also approved the arbitrator’s remedy, which ordered only prospective relief.¹³³

However, we also found inappropriate examples of judicial review under the four part essence test. *Alken-Ziegler, Inc. v. UAW Local Union 985*¹³⁴ is a case in point. While closing its plant on October 17, 2001 the company refused to pay vacation pay benefits to employees who did not work for it on January 1, 2002.¹³⁵ The CBA provided that eligibility for payment of vacation benefits is determined in reference to a “vacation year,” defined as “the calendar year period from January 1st to December 31st.”¹³⁶ In ruling for the union, and awarding vacation pay to all employees who were laid-off before 2002, the arbitrator reasoned that these workers were not at fault for failing to work the full year, and therefore “[i]t would be unreasonable to cause such forfeitures particularly where an employee has no control over the situation.”¹³⁷

The Sixth Circuit vacated the award¹³⁸ because it was based upon “general considerations of fairness and equity instead of the exact terms of the agreement.”¹³⁹ The court said that “the phrase ‘actually working’ is unambiguous— an employee must work

¹³¹ *Id.* at 849.

¹³² *Id.*

¹³³ *Id.* (bargaining remedy was found by the court to be “a fair solution to the problem presented, and we will not question it”).

¹³⁴ 134 Fed. Appx. 866 (6th Cir. 2005).

¹³⁵ *Id.* at 867.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 868.

¹³⁹ *Id.*

on January 1 to be eligible for vacation pay.”¹⁴⁰ The arbitrator was faulted for finding contractual ambiguity, where the court believed none existed, as a means to preclude the contract’s harsh effect on some employees.¹⁴¹ In basing his ruling on considerations of reasonableness, the arbitrator disregarded the contract.¹⁴² Thus, he failed “to enforce the labor contract as written,”¹⁴³ while imposing his own brand of industrial justice.

These judges failed to distinguish between reviewing an award for error, and reviewing to see if the arbitrator based the award on the contract. They did the former, not the latter, by delving into the contractual meaning of “actually working.” Thus, the Sixth Circuit treated the award as if it were a lower court ruling subject to ordinary appellate review. The arbitrator probably misinterpreted the contract. But the record shows that he based the award on a provision in the CBA. Thus, *Alken-Ziegler* conflicts with *Eastern*’s clear warning: “[A]s long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.”¹⁴⁴

• Finding No. 3(C): The Public Policy Test Makes No Significant Difference in Court Enforcement of Arbitrator Rulings.

Table 1 shows that 42 awards were challenged in district courts on public policy grounds, and were confirmed in 34 cases (81.0%). On 22 occasions an award was taken before an appellate court and was confirmed 18 times (81.8%). This bears on the public

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Judge Boggs dissented, believing that the disputed term, “actually working,” was ambiguous and therefore subject to the arbitrator’s interpretation. *Id.* at 868. He emphasized; “When the arbitrator must interpret a contract ambiguity, our case law is now quite clear (despite my dissent) that our review is restrained by one of the narrowest standards of judicial review in all of American jurisprudence.” *Id.*

¹⁴⁴ *Eastern*, *supra* note 76, at 62.

policy controversy in *Misco*¹⁴⁵ and *Eastern*¹⁴⁶ by showing that compared to other forms of award review, these challenges are now more likely to end in enforcement.

This finding is important but does not tell the whole story. Briefly, we examine three cases that offer valuable insights. In the first case (*Eaton*¹⁴⁷), an employer who had taken its public policy challenge to district court and lost, and appealed the matter to a circuit court, dropped the issue after *Eastern* was decided. The second case (*Sandvik*¹⁴⁸) suggests that employers realize that the Supreme Court has strong concerns about public policy review of an award. As a consequence, they avoid a frontal assault on the award, and re-characterize their public policy argument in terms of the CBA. Employers contend that an award which violates a public policy also fails to draw its essence from the agreement, because no contract can be interpreted to circumvent the law. The third case (*Mercy Hospital*¹⁴⁹) presents compelling facts that could prompt a court before *Eastern* to vacate a reinstatement award on public policy grounds. But in this example, the appellate court steadfastly refused to upset the arbitrator's award.

*Eaton Corp. v. Paper, Allied-Industrial, Chemical and Energy Workers Int'l Union*¹⁵⁰ is an example of an employer who abandoned its public policy challenge soon after the Supreme Court rendered its *Eastern* decision. An employee was lacerated fifteen minutes after starting his shift as a press operator.¹⁵¹ After he reported to the health

¹⁴⁵ *Misco*, *supra* note 72.

¹⁴⁶ *Eastern*, *supra* note 76.

¹⁴⁷ *Infra* note 150.

¹⁴⁸ *Infra* note 168.

¹⁴⁹ *Infra* note 177.

¹⁵⁰ 9 Fed. Appx. 310 (6th Cir. 2001).

¹⁵¹ *Id.* at 312.

department for treatment, the company administered a breathalyzer and urine test.¹⁵² The worker had a blood alcohol level of .18%, and tested positive for marijuana.¹⁵³ Following more testing, Eaton discharged him.¹⁵⁴ At arbitration, the union won reinstatement.¹⁵⁵ The arbitrator believed that the company lacked just cause because the individual's substance use occurred away from work.¹⁵⁶ Based on Eaton's rules, as well as testimony, the arbitrator found that employees are not subject to discipline for off duty conduct.¹⁵⁷

This background provides context for the new development in *Eaton*. The company originally contended that the award violated a well defined public policy in the Americans with Disabilities Act against accommodating a current drug user.¹⁵⁸ While its challenge was pending before the court of appeals, the Supreme Court issued *Eastern*.¹⁵⁹ In light of this ruling, Eaton withdrew its public policy argument,¹⁶⁰ but continued to challenge the award on grounds that it failed to draw its essence from the CBA.¹⁶¹

The Sixth Circuit explained that “[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,”¹⁶² a reviewing court's belief that the arbitrator has committed serious error will not suffice to overturn the award.¹⁶³ The arbitrator reasoned that urinalysis testing for illegal drugs only establishes “past drug use, not that the employee was using or was impaired on the

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 312-13.

¹⁵⁷ *Id.* at 313.

¹⁵⁸ *Id.* at 313, n.4.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 313.

¹⁶² *Id.* at 315.

¹⁶³ *Id.*

job.”¹⁶⁴ He also determined that employer rules that apply to the employment relationship should be enforced, while rules with no bearing on employment should be disallowed.¹⁶⁵ Consequently, the arbitrator concluded that the portions of the substance abuse policy which provided a second chance for some but not all workers who test positive were “unreasonable and therefore void.”¹⁶⁶ Because the labor agreement specifically provided the arbitrator authority to interpret the contract and modify any penalty, the Sixth Circuit concluded that “the proffered remedy was congruent with the CBA.”¹⁶⁷

The second case highlights a new type of public policy challenge, a hybrid approach that blends public policy and “essence of agreement” reasoning. In *Paper Allied-Industrial Chemical v. Sandvik Special Metals Corp.*¹⁶⁸ an employee repeatedly taunted a co-worker by calling him a “queer,” “faggot,” “MF,” and “cocksucker.”¹⁶⁹ The arbitrator characterized this conduct as “harsh language with sexual connotations.”¹⁷⁰ He also concluded that the fired employee “engaged in verbal conduct of a sexual nature . . . creating an intimidating, hostile, or offensive working environment.”¹⁷¹ But the arbitrator mitigated the penalty by taking into account the harasser’s work history.¹⁷²

In challenging the reinstatement award, the company equated the employee’s name calling with conduct that the Supreme Court believes is sexual harassment.¹⁷³

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 313.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 315.

¹⁶⁸ 132 Fed. Appx. 149 (9th Cir. 2005).

¹⁶⁹ See *Sandvik Special Metals Corporation, Appellant, v. Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 8-0369, AFL-CIO, f/k/a Local Union I-369, Oil Chemical and Atomic Workers International Union, AFL-CIO, Appellee.*, at 2004 WL 1216492 (Appellate Brief), at * 3.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at * 4.

¹⁷³ *Id.* at * 5 - * 8.

Blending its public policy and contract arguments, the company contended that the labor agreement, as interpreted by the arbitrator, violated the law.¹⁷⁴ The Ninth Circuit rejected this reasoning: “We generally regard an arbitrator’s interpretation of a collective bargaining agreement as the final word on the meaning of the contract because both employer and union have granted to the arbitrator the authority to interpret the meaning of their contract’s language, including such words as just cause.”¹⁷⁵ The court added that “[a]lthough strong public policy supports the prevention and reporting of harassment in the work force, no law, regulation, or precedent requires the Company to fire [an employee], without progressive discipline, for one allegation of harassment.”¹⁷⁶

*Mercy Hospital, Inc. v. Massachusetts Nurses Ass’n*¹⁷⁷ rejected a compelling public policy challenge. A hospital discharged a nurse with an excellent 25-year work history after she diverted drugs several times.¹⁷⁸ The problem arose when the hospital installed an automated medicine dispenser.¹⁷⁹ The nurse took too much medication to set up an intravenous drip bag for later use.¹⁸⁰ She violated the hospital’s policy for the new dispenser,¹⁸¹ but did not divert medicine to an improper source or harm any patients.¹⁸²

¹⁷⁴ *Id.* at * 10. The company’s brief said:

The Company has not, and does not, argue that the Arbitrator’s reinstatement of Jackson violates the public policy underlying Rule 412. Rather, it is the Arbitrator’s interpretation of the collective bargaining agreement as permitting the intrusive, humiliating and unnecessary questioning of sexual harassment victims in arbitration hearings which violates the public policy of protecting harassment victims from such questioning. . . . The Arbitration Award violated the public policy of protecting harassment victims from unnecessary embarrassment by interpreting the collective bargaining agreement to permit a deeply flawed arbitration procedure.

¹⁷⁵ Sandvik, *supra* note 168, at 150.

¹⁷⁶ *Id.*

¹⁷⁷ 429 F.3d 338 (1st Cir. 2005).

¹⁷⁸ *Id.* at 340-41.

¹⁷⁹ *Id.* at 341.

¹⁸⁰ *Id.* at 342, n.1.

¹⁸¹ *Id.* at 342.

¹⁸² *Id.* at 346.

She followed an old practice of preparing medications ahead of time,¹⁸³ instead of using an automated method to dispense and record medications.

The arbitrator determined that the nurse violated an important and reasonable rule, but reinstated her with reduced back pay because the penalty was too harsh in light of her lengthy and superior record.¹⁸⁴ The hospital sued to vacate the award and was unsuccessful before the district court.¹⁸⁵ On appeal the hospital lost again, as the First Circuit confirmed the arbitrator's ruling.¹⁸⁶

The hospital said that the arbitrator's award violated a clear and dominant public policy in Massachusetts of protecting patients from medical errors.¹⁸⁷ The court rejected this reasonable challenge: "After stuffing this straw man, the Hospital proceeds to shred it, telling us that because [the nurse] improperly diverted drugs in contravention of the state regulatory scheme, reinstating her to a sensitive position violates public policy."¹⁸⁸ The hospital ignored the fact that "the arbitrator, far from glossing over the discrepancies in the [dispenser] and SMS records, explicitly found that the Hospital had failed to prove that [the nurse] diverted any drugs away from patients."¹⁸⁹ The court explained that "even if the mandated reinstatement of a nurse found to have deliberately diverted drugs might violate an explicit, well-defined, and dominant public policy . . . the mandated reinstatement of a nurse who has been exonerated of all charges of intentional drug diversion, such as [this nurse], plainly would not."¹⁹⁰

¹⁸³ *Id.* at 342.

¹⁸⁴ *Id.* at 346.

¹⁸⁵ *Id.* at 343.

¹⁸⁶ *Id.* at 347.

¹⁸⁷ *Id.* at 344.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

In a related vein, the hospital attempted to find a separate public policy violation in the reinstatement of a nurse who commits serious documentation errors. It argued that improper accounting for controlled substances, even if not deliberate, is intolerable.¹⁹¹ The court agreed that the nurse's conduct seemed to violate Massachusetts nursing regulations,¹⁹² but citing *Eastern*, it rejected the employer's conclusion that this fact prohibited the arbitrator from ordering reinstatement order.¹⁹³

Overall, appellate courts are taking to heart the stern messages of *Misco* and *Eastern*. With few exceptions, the final judgment in a discharge case rests with the arbitrator. Courts are reluctant to intervene, even when compelling facts imply that reinstatement of an errant employee might pose a risk to the public or co-workers. The trend is the same, whether employers make conventional public policy challenges, or blend their theory with a *Trilogy* essence-of-agreement argument.

• Finding No. 4: The Second and Seventh Circuits Were Significantly More Deferential to Arbitration, and the Fifth Circuit Was Significantly Less Deferential to Arbitration, Than All Others.

Table 2 (*infra*) reports award confirmation rates by circuit courts of appeals. The center column shows district court results. The column on the right reports data for appellate courts. A statistical software program (crosstabs in SPSS) analyzed whether different enforcement rates among circuits were due to chance. All courts effectuate the *Enterprise Wheel* policy of judicial deference to awards, except in the Fifth Circuit.

¹⁹¹ *Id.* at 345.

¹⁹² *Id.*, citing 244 Mass.Code Regs. 9.03(38)-(39).

¹⁹³ *Id.*, using this strong language:

Once the issue is framed in that manner, it becomes nose-on-the-face plain that the Hospital has failed to establish any barrier at all to [the nurse's] reinstatement. Indeed, the Hospital has not identified a single iteration of positive law that prohibits the reinstatement of a nurse who, without causing injury to patients, made a few documentation errors or deviated slightly from doctors' orders on a single occasion in a long and distinguished career. This failure strongly suggests that the reinstatement order does not violate public policy.

Higher than predicted award confirmation rates were observed in the Second Circuit¹⁹⁴ and Seventh Circuit.¹⁹⁵ These high rates are not a problem for *Enterprise Wheel* because the Supreme Court has never expressed concern about too much judicial deference to arbitration. But the result for the Fifth Circuit defies the Supreme Court's repeated concern about judicial interference in arbitration. District courts confirmed only 8 out of 18 district courts awards (44.4%). The appeals court did nothing to correct this aberrant tendency, enforcing only 44.4% of disputed awards (in 4 of 9 cases).

Two cases from the Seventh Circuit shed light on the result for very deferential courts. The Seventh Circuit uses Rule 11 sanctions, and clever word plays, more than any other court to restrain attorneys from launching meritless challenges to awards.

Table 2
Labor Arbitration Award Confirmation by Federal Circuits (April 2001-May 2006)

	District Court Confirmation of Awards		Appeals Court Confirmation of Awards	
First Circuit	10/14	(71.4%)	5/6	(83.3%)
Second Circuit	14/15	(93.3%) *	1/1	(100.0%)
Third Circuit	18/23	(78.3%)	4/7	(57.1%)
Fourth Circuit	5/7	(71.4%)	2/3	(66.7%)
Fifth Circuit	8/18	(44.4%) *	4/9	(44.4%)
Sixth Circuit	42/53	(79.2%)	18/24	(75.0%)
Seventh Circuit	15/17	(88.2%) *	8/9	(88.9%)
Eighth Circuit	22/27	(81.5%)	9/11	(81.8%)
Ninth Circuit	12/15	(80.0%)	8/8	(100.0%)
Tenth Circuit	1/2	(50.0%)	1/1	(100.0%)
Eleventh Circuit	4/5	(80.0%)	0	
D.C. Circuit	5/5	(100.0%)	1/1	(100.0%)
Chi-Square (χ^2) 33.815, df = 22, p < .051. * Indicates observed values that departed from expected values.		Chi-Square (χ^2) 16.864, df = 22, p < .662. The result is not statistically significant, but may be due to the smaller sub-sample size.		

¹⁹⁴ District courts enforced 14 out of 15 awards (93.3%). Interestingly, only one award was appealed and it was confirmed. This suggests that lawyers are so aware of the Second Circuit's propensity to enforce awards that they do not bother to litigate labor arbitration awards before the appeals court.

¹⁹⁵ District courts enforced 15 out of 17 awards (88.2%), and 8 out of 9 awards (88.9%).

The court recently applied Rule 11 sanctions to make the point. The employer announced a plan to outsource twenty-two housekeeping jobs as a cost saving measure in *CUNA Mutual Insurance Society v. Office & Prof. Employees Int’l Union, Local No. 39*.¹⁹⁶ After negotiations with the union failed to lower wages, the company acted on its plan.¹⁹⁷ The union’s grievance was sustained by the arbitrator.¹⁹⁸ The award directed that the work be restored to the bargaining unit, ordered the parties to attempt to resolve back pay issues, and reserved the arbitrator’s jurisdiction to resolve any remaining controversy regarding implementation of the award.¹⁹⁹

The employer sued to vacate the award, contending that the company had a right to outsource this work and the arbitrator lacked authority to order the parties to negotiate the issue of damages.²⁰⁰ Besides confirming the award,²⁰¹ the court ordered CUNA to pay the union its \$9,132 attorney’s fees as a result of Rule 11 sanctions.²⁰² Judge Cudahy re-emphasized “the long line of Seventh Circuit cases that have discouraged parties from challenging arbitration awards and have upheld Rule 11 sanctions in cases where the challenge to the award was substantially without merit.”²⁰³

This decision did more than discourage long shot appeals of awards. It shouted a warning to attorneys who have unappealed arbitration clients to think twice before seeking redress in court.²⁰⁴ Judge Cudahy added in this case that the “precedent is clear

¹⁹⁶ 443 F.3d 556 (7th Cir. 2006).

¹⁹⁷ *Id.* at 558-59.

¹⁹⁸ *Id.* at 559.

¹⁹⁹ *Id.* at 559-60.

²⁰⁰ *Id.* at 560.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 561.

²⁰⁴ *Id.*, quoting the following admonition— the most strongly worded we have read in over 2,000 federal court opinions— from Judge Posner in *Dreis & Krump Mfg. Co. v. Int’l Ass’n of Machinists Dist.*

and emphatic and directs us to uphold sanctions in a broad spectrum of arbitration cases.

The filing of meritless suits and appeals in arbitration cases warrants Rule 11

sanctions.”²⁰⁵

The Seventh Circuit’s high deference to arbitration is also captured in a recent decision, *Dexter Axle Co. v. Int’l Ass’n of Machinists, Dist. 90*,²⁰⁶ that cleverly played on a word in *Enterprise Wheel*. Affirming the lower court, the Seventh Circuit declared: “It is abundantly clear that it is the arbitrator who is behind the driver’s wheel of interpretation, not the court. Great deference is paid to an arbitrator’s construction and interpretation of an agreement.”²⁰⁷

In contrast, a Fifth Circuit decision, *Continental Airlines, Inc. v. International B’hd of Teamsters*, highlights this court’s propensity to re-arbitrate grievances.²⁰⁸ An airline mechanic, Mark Johnson, was randomly drug tested. He registered a blood alcohol content of .115, an amount above the legal limit for intoxication in Texas.²⁰⁹ Although

8, 802 F.2d 247, 255 (7th Cir. 1986):

A company dissatisfied with the decisions of labor arbitrators need not include an arbitration clause in its collective bargaining contracts, but having agreed to include such a clause it will not be permitted to nullify the advantages to the union by spinning out the arbitral process unconscionably through the filing of meritless suits and appeals. For such conduct the law authorizes sanctions that this court will not hesitate to impose. Mounting federal caseloads and growing public dissatisfaction with the costs and delays of litigation have made it imperative that the federal courts impose sanctions on persons and firms that abuse their right of access to these courts. . . . Lawyers practicing in the Seventh Circuit, take heed!

²⁰⁵ *Id.*

²⁰⁶ 418 F.3d 762 (7th Cir. 2005). The decision involved an incentive pay standard that was part of the parties’ CBA. The agreement specifically allowed the union to challenge incentive standards, and the arbitration clause provided for submission of such a dispute before an expert in the field of work measurement or an arbitrator who is experienced in arbitrating incentive grievances. *Id.* at 764. The company’s 1999 incentive standard was referred to arbitration, and the resulting award favored the union. *Id.*, noting that the “Arbitrator shall have no power to set a standard and/or rate, or to establish methods or procedures. His authority shall be limited to reviewing whether the standard is proper and consistent with those established in the plant and has been properly applied.” The arbitrator granted affected employees lost wages resulting from the implementation of the new, improper standard. *Id.* at 765.

²⁰⁷ *Id.* at 768.

²⁰⁸ 391 F.3d 613 (5th Cir. 2004).

²⁰⁹ *Id.* at 615.

the airline discharged the employee, his grievance was resolved by reinstating him.²¹⁰ However, his Last Chance Agreement [LCA] set a long list of conditions, including more testing and an absolute prohibition against using medications that contain alcohol.²¹¹

On March 20, 2001, the worker left a voicemail for the employee assistance program director stating that he was taking cough medicine.²¹² Continental tested the employee for alcohol two days later, and measured his blood alcohol content level at .04 for the first test, and .029 for a confirmatory test.²¹³ Continental terminated Johnson for consuming alcohol.²¹⁴ The arbitrator issued an opinion holding that the last chance agreement was valid and binding.²¹⁵ However, the award concluded that the employee had not violated this agreement and ordered Continental to reinstate him.²¹⁶

This case is featured because of its striking similarity to *Eastern* and *Garvey*. The company in *Eastern* fired a repeat drug-policy violator on two separate occasions after he used marijuana while driving heavy machinery on highways, only to be directed by arbitrators to reinstate him. The Supreme Court ordered enforcement of the disputed award, stating that “both employer and union have granted to the arbitrator the authority to interpret the meaning of their contract’s language, including such words as just cause.”²¹⁷ In *Garvey*, the Ninth Circuit delved deeply into the record to reverse the arbitrator’s fact findings.²¹⁸ This provoked a severe rebuke from the Supreme Court. *Garvey* emphasized that “established law ordinarily precludes a court from resolving the

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 616.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Eastern*, *supra* note 76, at 62.

²¹⁸ *Garvey*, *supra* notes 94 & 97.

merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision."²¹⁹ The Fifth Circuit ignored these clear examples and instructions from the Supreme Court. The appeals court re-arbitrated the grievance by making its own findings of fact.²²⁰

• Finding No. 5: District Courts Confirmed 77.6% of Challenged Awards, an Increase of About 7 Percentage Points Compared to Our Earlier Studies of Litigated Awards from 1960-2001. The Confirmation Rate for Appellate Courts was 76.3%, an Approximate Increase of 7 Percentage Points.

Table 3 Comparison of Federal Court Confirmation of Labor Arbitration Awards 1960-2006				
	District Court Rulings		Appellate Court Rulings	
	<i>Confirm/Total</i>		<i>Confirm/Total</i>	
<i>Appealed Awards</i>				
<u>1960-1991</u>	724/1008	71.8%	301/427	70.5%
<u>1991-2001</u>	162/232	70.3%	77/116	66.4%
<u>2001-2006</u>	156/201	77.6%	61/80	76.3%

²¹⁹ *Id.*, *supra* note 93.

²²⁰ To support our conclusion that the court re-arbitrated the grievance, we quote at some length from *Continental Airlines*, *supra* note 208, at 620:

Here, the [arbitrator] concluded that Johnson was in compliance with the LCA [Last Chance Agreement] . . . because he spoke with someone on his doctor's staff and obtained approval from that person to take over-the-counter cough medicine. He then informed the EAP Director via voicemail that he was taking such medication. The record establishes that Johnson contacted his doctor's office to schedule an appointment, that he spoke with a member of the doctor's staff, and that the staff member informed Johnson that the doctor could not prescribe medicine without an appointment, but approved his taking over-the-counter cough medicine until his appointment date. There is no evidence of any kind that Johnson or a member of the doctor's staff spoke with the doctor regarding Johnson's situation, or that the doctor, either directly to Johnson, or indirectly to his staff, instructed Johnson to take over-the-counter cough medicine which contained alcohol. Thus, the uncontested evidence is that Johnson's doctor never approved the use of the cough medicine he took, either orally or by a formal prescription. Because Johnson's doctor did not prescribe him medicine containing alcohol, his notification to the EAP director, and that person's not calling him back, is irrelevant.

Our current study follows two previous investigations into court review of labor arbitration awards. In the first study, award confirmation rates by district and appellate courts from 1960-1991 were respectively 71.8% and 70.5%.²²¹ In a more recent study that examined court rulings from 1991-2001, very similar confirmation rates were observed: district courts enforced 70.3% of all challenged awards, and appellate courts confirmed 70.5% of awards.²²²

The current sample (April 1, 2001 – May 31, 2006) shows the first marked departure— a notable increase— from this long trend with a district court enforcement rate of 77.6%. The confirmation rate among circuit courts has been more variable over the past 46 years. Our last measurement, a 66.4% award confirmation rate from 1991-2001, registered a 4 percentage point drop from the previous period. Because appellate courts set precedents for district judges, the trend from 1991-2001 also posed potential to undermine the clear message of judicial deference in *Enterprise Wheel*. The data in Table 2 for 1991-2001 suggest that the Supreme Court, near the end of that period, wisely intervened by deciding *Eastern* in 2000,²²³ and *Garvey* a year later.²²⁴

The present confirmation rate of 76.5% for appellate courts has three-fold significance: (a) it is the highest rate we have ever measured in our database that begins with cases in 1960; (b) it is 10 percentage points higher than the previous period; and (c) the rate is especially significant because of the managerial role that appellate courts play in implementing *Trilogy* standards throughout the federal court system.

²²¹ LeRoy & Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals*, *supra* note 11, at 102.

²²² LeRoy & Feuille, *Private Justice in the Shadow of Public Courts*, *supra* note 11, at 49.

²²³ *Eastern*, *supra* note 76.

²²⁴ *Garvey*, *supra* note 85.

IV. CONCLUSIONS

Words often play a larger role than statistics in communicating legal trends. The role of precedent in American legal culture leads to the belief that prominent opinions are barometers of broader judicial conditions. But we believe that statistics speak much louder than words, and tell a more important story about the independence of arbitration from courts. The findings show that federal courts are fulfilling the vision of judicial deference to awards in *Enterprise Wheel*.

Nonetheless, readers who worry about erosion of judicial deference to arbitration will find new material in our current research to stoke their concern. The most controversial evidence of judicial activism that we uncovered is the Sixth Circuit's four part essence test. Judge Sutton condemned this test, remarking that no appellate standard except for those in *Enterprise Wheel* "requires more federal-court modesty than this one. Plain error, clear error, abuse of discretion, *Chevron* deference, AEDPA deference, substantial evidence and reasonableness all would seem to have more teeth than federal-court review of arbitration awards."²²⁵ He concluded that the four part essence test "has made it easier to vacate an arbitration award on the merits than the Supreme Court meant it to be."²²⁶

We have already shown that this seemingly intrusive standard does not lower award enforcement rates, but it stimulates an excessive amount of federal lawsuits.²²⁷ Even if the enforcement rate is unaffected, the parties' underlying bargain to make their award final and binding is seriously compromised. We, therefore, conclude that other

²²⁵ Michigan Family Resources, *supra* note 117, at 659.

²²⁶ *Id.* at 661.

²²⁷ *Id.* The judge also found that among unpublished opinions, the Sixth Circuit vacated 25% of those awards (19 out of 75) on similar grounds. *Id.*

circuits should avoid this standard. Also, the Sixth and Third Circuits should reconsider this test, and abandon it soon to ensure the finality of an outcome that is promised in an arbitration agreement.

This begs the question: What reviewing standard should replace the four part essence test? We reflect on our reading of 2,064 federal court decisions that rule on award challenges from 1960 - 2006, and reconsider Justice Frankfurter's dissent in *Lincoln Mills*.²²⁸ He saw nothing in the text or legislative history of Section 301 of the LMRA to authorize creation of a federal common law to enforce CBAs and their resulting arbitration awards. Section 301 was merely a procedural device—the creation of federal jurisdiction to apply state contract law to these disputes.²²⁹ Justice Frankfurter eerily wrote that *Lincoln Mills* attributed to Section 301 “an occult content.”²³⁰

We can now say that the essence test from *Enterprise Wheel* validates Justice Frankfurter's mystical allusion. No judicial standard could sound more like a potion from Harry Potter's world than this essence test. By its very title, the more elaborate form of this standard—the four part essence test—looks like a witch's incantation. The Sixth Circuit's test offers a clear example of Justice Frankfurter's prediction of “judicial inventiveness” in Section 301 litigation.²³¹

These observations inform our answer about a replacement standard for the four part essence test. *Enterprise Wheel* used a poor choice of words in referring to the

²²⁸ *Supra* note 1.

²²⁹ *Id.* at 475 (“Congress in its consideration of § 301 nowhere suggested dissatisfaction with the ability of state courts to administer state law properly. Its concern was to provide access to the federal courts for easier enforcement of state-created rights.”).

²³⁰ *Id.* at 460-461.

²³¹ *Id.* at 465, adding: “There are severe limits on judicial inventiveness even for the most imaginative judges. The law is not a brooding omnipresence in the sky, and it cannot be drawn from there like nitrogen from the air.” *Id.* His point was that federal judges are not “peculiarly qualified” to fashion a body of common law for collective bargaining agreements. *Id.* at 464-465.

essence of an agreement. This gave impetus to a few judges who have activist inclinations, but more important in light of our data, encouraged even more lawyers to stir the arbitration cauldron in search of an “essence” problem.

There is no need to find a verbal replacement for the four part essence test, and it is not practical to recant the more simple essence test in *Enterprise Wheel*. But if a replacement standard is desired, judges should simply recite the Supreme Court’s recent formulation— “as long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.”²³² This expresses the idea in the essence test, but with clarity.

Second, a correction is needed for the Fifth Circuit’s long term deviation from the deferential posture that the Supreme Court has commanded. The results in Table 2 put judges in this circuit in an isolationist camp. At the district and appellate levels, Fifth Circuit courts confirmed awards in only 44.4% of the cases. This follows similar findings in our earlier studies. In 96 district court decisions from 1960-1991 judges confirmed only 57 awards, yielding an enforcement rate of 59.4%. For 1991-2001, appellate courts confirmed 2 out of 5 challenged awards, resulting in a 40% confirmation rate.

This behavior exposes awards to a coin toss chance of non-enforcement, and ignores the precepts of *Enterprise Wheel*. More investigation is needed to see what factors explain this aberrant behavior. For now, our finding enables Fifth Circuit judges to see the problem and correct it by exercising more restraint.

For our third conclusion, we return to our finding that 16 appellate decisions

²³² Eastern, *supra* note 76, at 62.

confirmed awards that were vacated by district courts,²³³ while 5 awards were vacated by appellate courts after these arbitrator rulings were confirmed by lower courts.²³⁴ This measurement means that appellate courts are ensuring that lower courts adhere to *Enterprise Wheel* deference. As long as this ratio favors confirmation over vacatur—and notice the lopsidedness of this proportion—the precedent based judicial system will continue to send reinforcing *Enterprise Wheel* messages to district judges.

Fourth, the results are a healthy indicator for the national policy that favors arbitration. Table 3 shows that labor arbitration is largely independent from court interference. Current award confirmation rates are high, and have jumped 7-10 percentage points since the last measurement period. If judges give credence and effect to *Enterprise Wheel* during challenges to labor arbitration awards, this implies that other forms of arbitration also operate without court interference.

The *Trilogy*, and the popular soap opera that inspires are title, are remarkable for their continuing relevance. As in the TV show, the actors in the *Trilogy* have changed as a new generation of judges and arbitrators have come on to the scene. The antagonists—employers and unions—have changed, too, as have the viewers—lawyers and academics. But the underlying dramas that play out in courts and on TV are no different today compared to the 1950s and 1960s. We seriously doubt that *As the World Turns* would be a perennial favorite if the occasional judge in the show played a starring role, which leads to the fundamental conclusion of this empirical study: As challenges to arbitrator awards turn the *Enterprise Wheel*, federal judges play only a cameo role in the overall functioning of the nation's labor arbitration system.

²³³ See *supra* note 109.

²³⁴ See *supra* note 110.

V. RESEARCH APPENDIX: SAMPLE OF CASES

Publication of the cases in our sample is not required but enables a reader to verify our empirical findings. Also, this list provides a valuable resource for lawyers and academics.

AAF-McQuay v. United Electric, Radio & Machine Workers of America, 2003 WL 5040449 (W.D.Va. 2003)

Abel Const. Co., Inc. v. Kentucky State Dist. Council of Carpenters, 2004 WL 259590 (W.D. Ky. 2004)

Ace Elec. Contractors, Inc. v. International B'hd of Electrical Workers, Local Union 292, 414 F.3d 896 (8th Cir. 2005)

Airline Professional Assoc. of Int'l Brotherhood of Teamsters, Local Union No. 1224 v. ABX Air, Inc., 274 F.3d 1023 (6th Cir. 2001)

Airline Professional Assoc. of Int'l Brotherhood of Teamsters, Local Union No. 1224 v. ABX Air, Inc., 2005 WL 2704900 (S.D. Oh. 2005)

Alken-Ziegler, Inc. v. UAW Local Union 985, 134 Fed. Appx. 866 (6th Cir. 2005)

American Eagle Air Lines, Inc. v. Airline Pilots Ass'n Int'l Union, 343 F.3d 401 (5th Cir. 2003)

American Federation of Government Employees, Local 1617 v. Federal Labor Relations Authority, 103 Fed.Appx. 802 (5th Cir. 2004)

American Postal Workers Union, Philadelphia Local v. U.S. Postal Service, 222 F.Supp2d 675 (E.D. Pa. 2002)

American Postal Workers Union v. U.S. Postal Service, 2006 WL 908047 (D.D.C. 2006)

American Train Dispatchers Ass'n v. CSX Transp., Inc., 2005 WL 2149300 (N.D. Oh. 2005)

Ameritech Corp. v. Int'l Brotherhood of Electrical Workers, 2005 WL 1272138 (N.D. Ill. 2005)

Anderson Concrete Co. v. Int'l Brotherhood of Teamsters, Local Union 284, 2002 WL 193578 (S.D. Oh. 2002)

Anheuser-Busch, Inc. v. Local Union No. 744, Int'l Brotherhood of Teamsters, 280 F.3d 1133 (7th Cir. 2002)

Antonio Origlio, Inc. v. Local Union No. 830, International Brotherhood of Teamsters, 2001 WL 34355666

Appalachian Regional Healthcare, Inc., United Steelworkers of Am., 245 F.3d 601 (6th Cir. 2001)

Archer-Daniels Midland Co. v. Int'l Longshoreman's Ass'n, Local 1768-D, 268 F.Supp.2d 944 (N.D. Oh. 2003)

Arco Enterprises, Inc. v. Operative Plasterers' and Cement Masons' Int'l Ass'n of U.S. & Canada, 124 Fed. Appx. 710 (3d Cir. 2005)

Armco Employees Ind. Fed. V. AK Steel Corp., 149 Fed.Appx. 347 (6th Cir. 2005)

Ball-Foster Glass Container v. American Flint Glass Workers Union, 354 F.Supp.2d 839 (N.D. In. 2002)

Beard Industries v. Local Union 2297, Int'l Union, UAW, 404 F.3d 942 (5th Cir. 2005)

Bixby Medical Center, Inc. v. Michigan Nurses Ass'n, 142 Fed. Appx. 843 (6th Cir. 2005)

BP Products N.A., Inc. v. Paper, Allied Chemical and Energy Workers, Local Union 5-0436, 2003 WL 21105078 (N.D. Oh. 2003)

Brentwood Medical Associates v. United Mine Workers of America, 396 F.3d 237 (3d Cir. 2005)

Brotherhood of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment v. CSX Transp. Corp., 2005 WL 1863372 (M.D. Fl. 2005)

Brotherhood of Maintenance of Way Employees v. Soo Line Railroad Co., 266 F.3d 907 (8th Cir. 2001)

Brotherhood of Maintenance of Way Employees v. Terminal Railroad Ass'n of St. Louis, 307 F.3d 737 (8th Cir. 2002)

Brotherhood of Maintenance of Way Employees v. Union Pacific Railroad Co., 2004 WL 2296952 (N.D. Tex. 2004)

Brotherhood of Railway Carmen v. Kansas City Southern Railway Co., 2005 WL 2600435 (W.D. Mo. 2005)

Boise Cascade Corp. v. Paper, Allied-Chemical & Energy Workers, 309 F.3d 1075 (8th Cir. 2002)

Boston Medical Center v. Service Employees Int'l Union No. 285, 260 F.3d 16 (1st Cir. 2001)

Bureau of Engraving v. GCIU, Local 1B, 284 F.3d 821 (8th Cir. 2002)

Butler Mfg. Co. v. United Steelworkers of America, Local 2629, 336 F.3d 629 (7th Cir. 2003)

Capitol Beverages Co. v. Int'l Ass'n of Teamsters, Local 580, 211 F.Supp.2d 861 (W.D. Mi. 2002)

Citgo Asphalt Refining Co. v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union, Local No. 2-991, 385 F.3d 809 (3d Cir. 2004)

City Market, Inc. v. Local No. 7, United Food & Comm. Workers Int'l Union, 116 Fed. Appx. 960 (10th Cir. 2004)

City of New Orleans ex rel. Public Belt Railroad Commission v. United Transp. Union, 2002 WL 287721 (E.D. La. 2002)

Clear Channel Outdoor, Inc. v. Driver Sales & Warehouse Local Union No. 117, 2004 WL 2295987 (W.D. Wash. 2004)

Cleveland Elec. Illuminating Co. v. Utility Workers of Am., 440 F.3d 809 (6th Cir. 2006)

Coca-Cola Bottling Co. Consol. V. Int'l Brotherhood of Teamsters, Local Union No. 991, 411 F.Supp2d 1338 (S.D. Al. 2006)

Communications Workers of America v. Verizon Services, Inc., 404 F.Supp.2d 62 (D.D.C. 2005)

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